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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1943.

No. 545.

FRED SCHROEPFER, CHARLES R. SCHROEPFER AND ABRAHAM BERRY,

Petitioners,

vs.

THE A. S. ABELL COMPANY, INC.,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI

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The petitioners, Fred Schroepfer, Charles R. Schroepfer and Abraham Berry, respectfully move this Honorable Court for leave to file a petition for rehearing and respectfully show:

1. On December 16, 1943, petitioners filed in this Court a petition for writ of certiorari to review a judgment of the United States for the Fourth Circuit, and certiorari was denied on January 17, 1944.

2. Thereafter, on April 24, 1944, this Court decided the cases of National Labor Relations Board v. Hearst Publications, et al. (Nos. 336-339, Oct. Term, 1943), involving an employment relation substantially identical with that of petitioners in this case. Petitioners believe that although the statute involved in Nos. 336-339 is the National Labor Relations Act, whereas the present suit involves the proper interpretation of the Fair Labor Standards Act of 1938, the rights in issue and the nature of the employment relation are such that this Honorable Court should reconsider its action denying certiorari and should entertain at this time a petition for rehearing.

R. Simpson & Co., Inc., v. Commissioner of Internal Revenue, — U. S. — (No. 1, Oct. Term, 1943, decided Feb. 14, 1944) and cases cited.

STATEMENT OF THE MATTER INVOLVED

This case involves an important question of coverage under the Fair Labor Standards Act of 1938, 29 U. S. C., Secs. 201 ff., and particularly as it applies to those employees of a large metropolitan newspaper who are engaged in the local distribution of its papers. Respondent is the publisher of the Baltimore Sunpapers. The facts as to respondent's interstate business briefly summarized are these: respondent receives news flashes from all over the world as well as numerous syndicated columns and other national features, advertising is solicited outside the state, raw materials used in the publication of the newspapers are derived principally from outside the state, parts of the paper (such as the Sunday rotogravure section and the magazine section) are received from without the State already printed and ready for circulation, and about 7% of its distribution is outside of the State of Maryland. Its

local distribution of papers during the period involved in this proceeding was carried through three main channels: carrier delivery; sale through news stands and newspaper counters in stores, hotels, depots, etc.; and sale through "racks" or street corner receptacles in which the papers were placed and subsequently removed by the purchaser who paid for them by leaving his pennies in the attached coin box. In the latter two methods of distribution respondent made use of the so-called "rackmen" whose duties included delivering papers to the stores and to the racks. In the discharge of these duties each rackman needed a helper who was selected by the rackman and received his compensation directly from him. Respondent knew that in the service of the racks the rackmen needed and had helpers.

The rackmen were employees, as shown by the following facts, which were fully supported by the record: The rackmen were limited in the route where their work was done and the respondent reserved the right to, and did on occasion, take away busy racks from their routes and gave the "points" to newsboys; the rackmen were permitted to distribute respondent's papers only and were not allowed to assign or sell their routes; the sales price of the papers was fixed by the respondent; their hours of work were determined by the respondent in regulating the time of its various editions, as the men were expected to be on hand when the papers came off the presses and they had to punch a time clock when reporting in the morning; the number of papers allotted to the men was in the control of the respondent; their returns were limited by the Circulation Department; they were supervised in the manner of servicing the racks and were required to attend meetings at which they were asked by the Circulation Manager what "they were doing and thinking about" and were given "pep

talks" on the value of advertising; they were compelled to put up advertising cards in the racks, even those promoting cheaper carrier service to their own detriment; they were required at their expense to insure respondent against liability due to the negligent operation of their automobile; they were compelled to make minor repairs to racks; they were threatened with discharge for breaches of discipline; they had to distribute Sunday papers for a fixed compensation estimated to cover little more than the cost of operation of their automobiles; they were required to solicit all stores in their routes, although it was uncontradicted that the compensation allowed for such "sales" was inadequate; in 1941 additional editions were put out and the men were required to make additional trips without extra compensation; the respondent exercised further control over the earnings of the men by varying the rack rental in its arbitrary discretion. And if respondent's own testimony is to be accepted, the amount allowed the men for car expense was also fixed by respondent. Furthermore, the respondent, through certain of its high-ranking officials described the petitioners as employees in a book written by them under the title "The Sunpapers of Baltimore".

Petitioners Fred Schroepfer and Charles R. Schroepfer were rackmen and in this proceeding they sought recovery of unpaid overtime compensation; and petitioner Abraham Berry acted as a rackman's helper to the Schroepfers and he sought recovery of both unpaid minimum wages and overtime compensation.

The District Court of the United States for the District of Maryland, sitting as a jury, decided that petitioners, Fred and Charles Schroepfer, were not employees of the respondent but were independent contractors. It also held

that petitioner Berry in his work as helper was not an employee of the respondent but was the employee of the other petitioners. Finally, the District Court held that although the respondent was admittedly engaged in interstate commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act, the petitioners were not engaged in interstate commerce.

The Circuit Court of Appeals for the Fourth Circuit affirmed the lower Court on the sole ground that the petitioners were not engaged in commerce within the meaning of the Act. The Circuit Court of Appeals made no finding on the question of whether petitioners were employees of respondent.

If, as petitioners contend, their work was in interstate commerce then the question of whether they were employees under the Fair Labor Standards Act will also have to be determined by this Court.

THIS COURT HAS JURISDICTION

This Court has jurisdiction under Sec. 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec. 347). The Circuit Court of Appeals decided this case on September 16, 1943, and its mandate issued on October 18, 1943.

THE QUESTIONS PRESENTED

1. Were the rackmen and their helpers who distributed newspapers of the respondent to stores and racks in Baltimore City engaged in interstate commerce within the meaning of the Fair Labor Standards Act?

2. Were the petitioners employees of respondent within the meaning of the Act?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

In the present case the Circuit Court of Appeals decided "a federal question in a way probably in conflict with applicable decisions of this Court" (Supreme Court Rule 38 (5) (b)). Two guides to decision exist in the precedents of this Court. In *Overstreet v. North Shore Corporation*, 318 U. S. 125, the test laid down is whether the work of the employees "is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' * * * and justifies regarding petitioners as 'engaged in commerce' within the meaning of the Fair Labor Standards Act." In *Walling v. Jacksonville Paper Company*, 317 U. S. 564, the test to determine whether an employee, engaged in local distribution of goods imported from without the State by a wholesaler, is within the coverage of the Act, depends upon a finding that "there is a practical continuity of movement of the goods until they reach the customers for whom they are intended."

If a realistic appraisal of respondent's business and petitioners' relation to it is made, petitioners' activity satisfies the tests set up in both the *Overstreet* and *Jacksonville* cases.

The movement of intelligence or information across state lines is interstate commerce, and has been frequently so held in decisions of this Court. Petitioners' work was an integral part of the interstate gathering and distribution of news in which respondent is engaged, for the process which begins with the collection of news, admittedly an interstate activity, is continuous and does not end until the paper is placed in the hands of the customer or reader.

Respondent's business must be conceived in large as the gathering and editing of news, soliciting of advertising,

assembling and printing, and distributing. It is the sum of these activities that constitutes the interstate business of respondent. Petitioners' work of distribution was a link in the transmission of the news from world-wide sources to the ultimate reader. It is unquestionably true that if the distribution of the paper were suddenly stopped, the very life of respondent's business would be jeopardized, and this would mean the virtual destruction of the news-gathering, advertising-soliciting, supplying of raw materials, and all the other operations of respondent transcending state boundaries. It is clear, therefore, that petitioners' work is "in commerce" within the broad definition laid down by this Court.

That the commerce in the present case is largely unidirectional is of no significance. Moreover, if commerce exists and the employment of a particular employee plays an important role in the traffic, he is engaged in commerce even though his own work does not transcend state boundaries. Distribution of the completed newspaper, being the ultimate step in the publishing process, is an activity in interstate commerce.

If the distribution of the papers is seen in its true perspective as the final step in the unitary news-gathering-assembling-editing-and-distributing process, petitioners' activity cannot be sheared off from the work of the rest of respondent's employees and considered purely local in character. To sever this stage arbitrarily from what precedes it would be to disregard entirely the primary function of a modern newspaper, which is to bring news from the "four corners" of the earth to the reader.

In the *Jacksonville* case the Court stated that if extra-state goods had a specific local destination, the goods enjoyed a *practical* continuity in transit so as to render their

distribution from a local warehouse an activity in interstate commerce. In the instant case, the matter of handling the news demonstrates that there was *actual* continuity in transit; the transmission was "as continuous and rapid as science can make it." (*Western Union Telegraph Co. v. Foster,* 247 U. S. at 113.) But the facts of this case also indicate that there was a "practical continuity" in the sense that that phrase was used in the *Jacksonville* case. The intelligence or information when it began its interstate journey was not destined to stop at the newspaper plant, but instead was intended to move immediately to the racks, and to the stores and other places which had standing orders or their equivalent with respondent.

Petitioners were fully as much a part of that movement as were employees receiving news off the wires. Petitioners were therefore engaged in commerce within the meaning of the Act.

With regard to the issues of whether the employer-employee relationship existed in this case "an important question of federal law which has not been but should be settled by this Court" (Supreme Court Rule 38 (5) (b)), is presented. For this question involves the proper interpretation to be given the statutory language contained in Sec. 3 (g) of the Fair Labor Standards Act "that 'employ' includes to suffer or permit to work"; and in the absence of a final ruling by this Court, the Congressional intent cannot be definitely ascertained. Moreover, if this critical language of the statute is restricted to cover only those who are employees at common law, as held in the opinion of the District Court, the benefits of the Act will be withdrawn from large groups of workmen to whom Congress undoubtedly intended such benefits to apply.

The failure of the Circuit Court of Appeals to pass upon this question should not interfere with its consideration

by this Court. We believe that this Court has already shown that it regards the definition of the employer-employee relationship under social legislation of prime importance.

In *National Labor Relations Board v. Hearst Publications et al.*, this Court upheld a finding of the Board that the "newsboys" were employees, even though the elements of control were less clearly defined than here.

It is noteworthy that the language employed in the definition of the employment relation is more restricted in the National Labor Relations Act than in the Fair Labor Standards Act, and it would seem to be at least equally important that the scope of the coverage under the latter Act, as under the former one, should be settled by this Court.

Respectfully submitted,

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